In faint praise of the derogating will: The UK, ECHR derogation, and Smith v. MOD

Article

Accepted Version

In Faint Praise of the Derogating Will:

The UK, ECHR derogation, and *Smith v. MOD*[1]

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Social peace is a two-sided affair. Ultimately our societies depend on shared bonds and mutual understanding. From time to time, voices do speak in terms which are not helpful to the rule of law.[2]

1. Introduction

Reducing the country's human rights obligations has been officially mooted by various UK governments over the years. Although legislative change is not considered to be imminent,[3] a flavour of the rising irritation at human rights obligations, voiced in official British circles, is easily located within the most contentious environment for human rights law in Britain: the extra-territorial effect and application of the European Convention on Human Rights (ECHR), and most particularly, of ECHR applicability during Council of Europe Member State deployments of their armed forces overseas. This development has become especially contentious in Britain in recent years, due to the fairly-frequent deployment of its armed forces overseas, not least in Afghanistan and Iraq.[4] Therefore, this short discussion seeks to overview some of the legal

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[1] [2013] UKSC 41, on appeal from [2011] EWHC 1678 QB; [2012] EWCA Civ 1365.

[2] Owen Boycott, 'British Supreme Court Justice makes veiled attack on Donald Trump' *The Guardian* (London, 8 March 2017) <https://www.theguardian.com/law/2017/mar/08/british-supreme-court-justice-makes-veiled-attack-on-donald-trump> accessed 21 May 2017 (quoting Lord Mance, 'Speech', the Bahamas, February, 2017).

[3] Rebecca Hacker, 'Minister Confirms Indefinite Delay In Plans to Replace Human Rights Act' (*RightsInfo*, 25 January 2017) <http://rightsinfo.org/plans-replace-human-rights-act-put-hold/?utm_source=Weekly+Updates&utm_campaign=a25f304044-Weekly_Newsletter_Test4_22_2015&utm_medium=email&utm_term=0_5de50f2649-a25f304044-115312793> accessed 21 May 2017. See, eg, Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', September 2014 <https://assets.documentcloud.org/documents/1308660/protecting-human-rights-in-the-uk.txt> accessed 21 May 2017.

[4] See Christian Tomuschat, 'Human rights and international humanitarian law' [2010] 21(1) EJIL 15, 16 (the most fundamental of all human rights is the individual's right to life). In agreement, *Bugdaycay v. SOS Home Department* [1987] Parliamentary Archives,

implications of human rights legislative change in a post-EU, or 'Brexit', UK,[5] in which EU- and ECHR-related human rights obligations may both disappear or be greatly diminished.

On the basis of official British irritation at human rights, it may come as little surprise to some that, in what was potentially a first step towards eventual legislative change to current standards of substantive human rights coverage, the then Conservative Party-led government, on 4 October 2016, expressly declared its intention to derogate in future overseas deployments and operations from its human rights commitments to British military personnel, 'if possible, in the circumstances that exist at that time'.[6] The then government's two main rationales were linked: the military should not be unduly hampered by fear of litigation, in general, when planning military operations and deploying its personnel overseas, and the government should not be exposed, in particular, to 'vexatious' human rights litigation in such a context, which has in fact occurred during recent deployments in Iraq and Afghanistan, and which has been highly-expensive. To clarify the latter point, military-linked litigation has arisen during recent deployments overseas of British forces, and has been generated either by the death or injury of British military personnel themselves, or by the death or injury of persons whom British personnel have detained and/or imprisoned.

HL/PO/JU/18/247, 13, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1986/3.html&query=bugdaycay&method=boolean> accessed 21 May 2017.

[5] Parliamentary Joint Committee on Human Rights (JCHR), *The human rights implications of Brexit: Conclusions and recommendations*, 16 December 2016 <http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/69502.htm> accessed 21 May 2017; *Brexit Activities (ongoing)*, BIICL <http://www.biicl.org/brexit> accessed 21 May 2017; Tobias Lock, 'What does Brexit have to do with human rights?', OUP blog, 13 June 2016 <https://blog.oup.com/2016/06/brexit-human-rights-law/> accessed 21 May 2017.

[6] News story, 'Government to protect Armed Forces from persistent legal claims in future overseas operations' (London, Ministry of Defence, 4 October 2016) <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations> accessed 21 May 2017; Peter Walker and Owen Boycott, 'Plan for UK military to opt out of European convention on human rights' *The Guardian* (London, 4 October 2016) <https://www.theguardian.com/uk-news/2016/oct/03/plan-uk-military-opt-out-european-convention-human-rights> accessed 21 May 2017. In December 2015, the Defence Minister indicated a similar intention. See, eg, Sam Grant, 'The Government Wants to Limit Human Rights Of Soldiers. Don't They Deserve Protecting?' (*RightsInfo*, 8 May 2016) <http://rightsinfo.org/government-wants-limit-human-rights-soldiers-acting-abroad-dont-soldiers-families-deserve-protection/> accessed 21 May 2017.

The extra-territorial extension abroad of the ECHR is fairly recent,[7] while, in contrast, securing the rights of serving British military personnel has developed only slowly, over many years, starting with the Crown Proceedings (Armed Forces) Act 1987, which statute finally allowed service personnel to sue the Ministry of Defence (MOD) for negligence.[8] Since then, a recognition, both in law and amongst the public, has grown that governmental responsibility for arbitrarily-inflicted death or injury of, or by,[9] British military personnel, including when on active duty overseas, is in fact the proper subject of express rights obligations. In turn, the ECHR, as a 'living instrument',[10] is interpreted teleologically, such that its eventual, extra-territorial extension should not be overly-surprising. Moreover, inasmuch as the English courts, since 1998, have had direct jurisdiction over claims arising under the ECHR brought in Britain,[11] and that the UK has recently engaged in numerous military adventures overseas, it was always only a matter of time before ECHR applicability would gradually be extended by the Strasbourg Court (the European Court of Human Rights, or ECtHR) to include such operations.[12]

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[7] Including, inter alia, the territorial context utilised in *Soering v. UK* (1989) 11 EHRR 439 [86]; the spatial model used in *Bankovic v. Belgium* (2001) 11 BHRC 435; and, the physical model used in *R (Al-Skeini) v. SOS for Defence* (2011) 53 EHRR 589.

[8] *Matthews v. MOD* [2003] UKHL 4 [7]. See *Smith (No. 2)* (n 1) [179] (Carnwath L citing HC Deb 13 February 1987**,** vol 110, cols 567-609), regarding the same intent behind the Crown Proceedings (Armed Forces) Act 1987 s 2(2), and the Reserve Forces Act 1980. Today, the Armed Forces (Pension and Compensation) Act 2004 provides the military's statutory no-fault compensation scheme.

[9] See, eg, Saxon Norgard, 'Key Things You Need To Know About the Important New Iraq War Test Case' (*RightsInfo*, 13 September 2016) <http://rightsinfo.org/five-things-need-know-new-al-sadoon-judgment/?utm_source=Weekly+Updates&utm_campaign=30f12c5352-Weekly_Newsletter_Test4_22_2015&utm_medium=email&utm_term=0_5de50f2649-30f12c5352-115312793> accessed 21 May 2017 (overview of *Al-Saadoon & Ors v The Secretary of State for Defence & Ors* [2016] EWCA Civ 811, 9 September 2016)**.**

[10] First noted by the European Court of Human Rights in *Tyrer v UK* App no 5856/72 (ECtHR, 25 April 1978) Series A no 26. See George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy', SSRN, March 14, 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 accessed 22 May 2017.

[11] Due to Parliamentary sovereignty, s 2 Human Rights Act 1998 (HRA) only requires UK courts to 'take into account' the rulings of the Strasbourg Court when they are interpreting ECHR rights, and s 3(1) HRA requires UK courts to read and give effect to UK legislation in a way which is compatible with Convention rights 'so far as it is possible to do so'. See, eg, Liberty, 'Briefing on Derogations and the Human Rights Act', September 2016, <https://www.liberty-human-rights.org.uk/sites/default/files/campaigns/resources/Liberty%20Briefing%20on%20Derogations%20and%20the%20Human%20Rights%20Act.pdf> accessed 22 May 2017; Daniel Charity, 'Supreme Court President: UK Human Rights are not a "Power Grab" by Judges' (*RightsInfo*, 17 March 2017) <https://rightsinfo.org/supreme-court-human-rights-laws-judges/> accessed 21 May 2017.

[12] Being acknowledged 'exceptionally' in *Bankovic v. Belgium* [2001] (n 7) [71], and on grounds of 'physical and legal control' in *R (Al-Skeini) v. SOS for Defence* [2011] (n 7) [137]. See Marko Milanovic, European Court Decides Al-Skeini and Al-Jedda' (*EJIL: Talk!*, 7 July 2011)

Soon afterwards, the ECHR Article 2 'right to life', specifically, of service personnel deployed on active duty overseas, was expressly acknowledged by Britain's highest court - the UK Supreme Court - in 2013, in *Smith & Ors. (No. 2) v. Ministry of Defence No. 2.*[13]

The recently-announced 'presumption to derogate' is the Conservative Party-led, UK government's riposte,[14] which, to an extent, reflects the deep unease also voiced in certain military and political circles, regarding the appropriateness of extending individual rights protections to, and in, dangerous, operational environments. Lingering questions as to the proper balance, between Britain's international human rights obligations, and its obligations under International Humanitarian Law (IHL), during military deployments, make the matter even more complex.[15] This short discussion thus critically considers the legal implications of the government's future 'presumption to derogate' in a post-EU, 'Brexit UK,[16] in which many existing human rights obligations are likely to be undermined, or even disappear.[17] As such, it is speculated that the recent announcement of a 'presumption to derogate' in future is in fact designed to lay the groundwork for wider legislative change, including British withdrawal from the ECHR, and/or the repeal of the Human Rights Act 1998 (HRA), as currently threatened,[18] and to normalise reductions in rights coverage, in general.

<http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/> accessed 21 May 2017.

[13] (n 1).

[14] See, eg, Marko Milanovic, 'UK to Derogate from the ECHR in Armed Conflict' (*EJIL: Talk!*, 5 October 2016) <http://www.ejiltalk.org/uk-to-derogate-from-the-echr-in-armed-conflict/> accessed 21 May 2017.

[15] Specifically, IHL permits lawful killing, while the ECHR generally does not. Regarding the interplay of the two legal regimes, see Nico Shrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-Terrorism and International Law', 1 April 2010, ss 1 - 2 [56] – [68] <http://www.uni-koeln.de/jur-fak/kress/Materialien/Chef/HP882010/LeidenPolicyRecommendations1April2010.pdf> accessed 22 May 2017.

[16] See (n 5).

[17] See, eg, Angela Patrick, *Mapping the Great Repeal: European Union Law and the Protection of Human Rights*, Thomas Paine Initiative Paper, October 2016, <http://www.ariadne-network.eu/wp-content/uploads/2015/03/Mapping-the-Great-Repeal-Thomas-Paine-Initiative-November-2016.pdf> accessed 22 May 2017; Tobias Lock, *The EU and Human Rights*, Royal Society of Edinburgh Briefing Paper, May 2016, 7, <https://www.rse.org.uk/cms/files/advice-papers/2016/The%20EU%20and%20Human%20Rights.pdf> accessed 22 May 2017.

[18] Heather Stewart, 'Ministers put British bill of rights plan on hold until after Brexit', *The Guardian* (London, 29 December 2016) <https://www.theguardian.com/law/2016/dec/29/ministers-put-british-bill-of-rights-plan-on-hold-until-after-brexit> accessed 22 May 2017 (Conservatives want to withdraw from the ECHR and to repeal the HRA).

The structure of the discussion is as follows. After a preliminary outline of what derogation entails, the government's stated rationales for its 'presumption to derogate' in future are critically considered. The 'vexatious litigation' argument currently being employed by the government to support derogation is then contextualised by means of a discussion of the *Smith (No. 2)* case.[19] Ii is concluded that, inasmuch as the extra-territoriality of ECHR obligations during military deployments overseas is now widely acknowledged (if not universally accepted), the legal extension of human rights availability *at all times* has exacerbated existing frictions between law and politics, accelerated a wider debate as to rights coverage, exposed a disturbing normalising of rights downgrades, and carries real dangers for the future in terms of public accountability and the rule of law.[20]

2. Derogation

Derogation from the ECHR is permitted as per Article 15, which provides as follows:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture and of unhuman or degrading treatment], 4(1) [prohibition of slavery or servitude], and 7 [prohibition of *crimen sine lege*], shall be made under this provision.
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.[21]

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[19] (n 1).

[20] Consider, eg, the Regulation of Investigatory Powers Act 2000), which came into force alongside the HRA 1998, and establishes the Investigatory Powers Tribunal. In *Regina (for Privacy International) v. I.P.T.* [2017] EWHC 114, Leggatt J queried the consistency of RIPA s 67(8) with the rule of law, as the Act originally afforded no right of appeal from the IPT.

[21] See ECHR Press Unit, 'Factsheet: Derogation in time of emergency' (February 2017) <http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf> accessed 22 May 2017. See also JCHR (n 5) 'Written evidence', Council of Europe, Rapporteur on States of Emergency (Raphael Comte), 'Written evidence to the JCHR: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights (DRO0003', 29 March 2017) <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-

Member states are also allowed to derogate from the International Covenant on Civil and Political Rights (ICCPR) 1966, as per Article 4 of that instrument.[22] While neither the ECHR nor the ICCPR define specifically what is meant by a 'public emergency threatening the life of the nation',[23] the following four requirements were developed and clarified in 1969 by the Council of Europe's Commission on Human Rights:[24] the emergency must be actual or imminent; its effects must involve the whole nation; the continuation of the community's organised life must be threatened; and, the crisis or danger being experienced must be 'exceptional', that is to say, that ordinary measures or restrictions for maintaining public safety, health and good order are clearly inadequate. Further, the burden of proof in establishing that such a 'public emergency' exists is on the derogating state party.[25]

As per Article 15(1), and taking Article 15(2) into account, any measures adopted must not be inconsistent with the derogating state's other international law obligations; Article 15(3) implies that derogation must be 'temporary', lasting no longer than absolutely necessary, as the consequences of derogation impact on individuals, who lose their full, 'peacetime' enjoyment of certain rights. So far, so clear, but practice varies, and with many governments since 9/11 placing increasing emphasis on *anticipating* risks,[26] the traditional parameters (and duration) of state emergency derogation have become rather more ambiguous. It is in this 'anticipatory' climate that the UK announced its 'presumption to derogate' in future, in October 2016.

Council of Europe Member States which have derogated recently, albeit for domestic contexts alone, include Turkey and France,[27] each having filed a

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committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/publications/> accessed 22 May 2017.

[22] The UK is a party.

[23] A phrase first interpreted in 1961, in *Lawless v. Ireland* (No. 3) App no 332/57 (A/3) (ECtHR, 1961).

[24] See the *Greek Case*, Council of Europe, European Commission of Human Rights, Report of the Sub-Commission, Vol I Pt 1 (1969) < file:///C:/Users/Admin/AppData/Local/Temp/001-73020.pdf> accessed 22 May 2017.

[25] ibid. cf Raphael Comte (n 21).

[26] See, eg, J. McCulloch and S. Pickering, 'Pre-crime and counter-terrorism: imagining future crime in the "war on terror"' [2009] 49(5) BrJCrim 628. See also Council of Europe, *Annual Activity Report 2016: A critical turning point, not business as usual, for human rights in Europe* (Strasbourg, 26 April 2017) <http://www.coe.int/fr/web/pristina/-/a-critical-turning-point-not-business-as-usual-for-human-rights-in-europe> accessed 22 May 2017.

[27] As of the time of writing, Belgium has not derogated from the ECHR, despite three coordinated suicide bombings on 22 March 2016, two occurring at Brussels airport, and the third, at Maalbeek metro station. The attacks have prompted Belgium, inter alia, to enact new counterterrorism laws and regulations, carry out raids, deploy more soldiers in major cities, etc. *Grounds for Concern, Summary,* Human Rights Watch <https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterror-responses-paris-and-brussels-attacks> accessed 22 May 2017.

series of formal notices of derogation with the Secretary General of the Council of Europe, after first declaring 'states of emergency'. France initially filed on 20 November 2015,[28] in response to terrorist attacks in Paris, on 13 November. As these terrorist atrocities have been followed by other terrorist incidents elsewhere in France, the government has extended and broadened its derogation, through to and beyond the country's Presidential elections, which took place on 7 and 23 May 2017,[29] and the French legislative elections, currently scheduled for 11 and 18 June.

Turkey's emergency derogation occurred after the country experienced a failed political coup attempt led by the state's military on 15 July 2016,[30] the aftermath of which caused serious domestic upheaval. It followed France in declaring derogations on 21 July 2016,[31] 11 October 2016,[32] and 3 January 2017,[33] which impacted on its human rights obligations;[34] on 23 January

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[28] See, eg, Marko Milanovic, 'France Derogates from ECHR in the Wake of the Paris Attacks' (*EJIL: Talk!*, 13 December 2015) <http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/> accessed 21 May 2017.

[29] Concerning subsequent derogation extensions on 19 February 2016, 20 May, 25 July and 19 December, which presumably is still in force, as the Council of Europe has not notified Member States of its discontinuance, as of 25 May 2017. See Council of Europe, *France - Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification - JJ8285C Tr./005-202 (Strasbourg, 22 December 2016) <https://wcd.coe.int/ViewDoc.jsp?p=&id=2450299&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[30] See, eg, Politics, 'Council of Europe Secretary General: Turkey has a right to "derogate" ECHR', *Daily Sabah* (Ankara, 24 July 2016) <http://www.dailysabah.com/politics/2016/07/24/council-of-europe-secretary-general-turkey-has-a-right-to-derogate-echr> accessed 22 May 2017.

[31] Council of Europe, *Turquie - Communication relative à la Convention de sauvegarde des Droits de l'Homme et des Libertés Fondamentales,* STE n° 5, Notification - JJ8190C Tr./005-192 (Strasbourg, 25 juillet 2016) <https://wcd.coe.int/ViewDoc.jsp?p=&id=2436911&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[32] Council of Europe, *Turkey - Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification - JJ8239C Tr./005-199 (Strasbourg, 18 October 2016) <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=NotificationJJ8239C&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[33] Council of Europe, *Turkey - Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms,* ETS No. 5, Notification - JJ8289C Tr./005-203 (Strasbourg, 6 January 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=NotificationJJ8289C&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[34] After which tens of thousands of public employees, including military personnel, were sacked or suspended from their posts, and/or arrested. See, eg, *Zihni v. Turkey* App no 59061/16 (ECtHR 385, 8 December 2016): claim dismissed, as 'no special circumstances' absolved the applicant's non-exhaustion of domestic remedies, although the emergency measures did not permit appeal. See Emre Turkut, 'Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?' (*EJIL: Talk!*, 28 December 2016)

2017, it also communicated the establishment of a domestic Inquiry Commission on the State of Emergency Measures.[35] Similar to France, Turkey has not specified precisely which ECHR articles it was derogating, although it did so for its ICCPR derogation,[36] nor has it been explicit as to how the derogations would take effect.[37] However, dissimilar to France, the Council of Europe Human Rights Commissioner on 15 February 2017 urged the Turkish government to lift the state of emergency.[38] Therefore, it can be seen that, should the UK derogate, it would not be alone in the current climate in taking such a step. As for derogation in relation specifically to military deployments, there is also some precedent, as Ukraine, in June 2015, similarly notified the Council of Europe of the Ukraine's derogation in relation to its ongoing, border fighting with Russia,[39] followed by further extensions registered at the Council of Europe on 5 November 2015,[40] 1 July 2016,[41] and 3 February 2017.[42]

<http://www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/> accessed 21 May 2017. See generally Council of Europe (Venice Commission), *Opinion No. 865/2016, on Emergency Decree Laws Nos. 667 – 676 Adopted Following the Failed Coup of 15 July 2016,* CDL-AD(2016)037, 9 – 10 (Strasbourg, December 2015) <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e> accessed 22 May 2017.

[35] Council of Europe, *Turkey - Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification - JJ8311C Tr./005-204 (Strasbourg, 31 January 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&id=2452623&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[36] Stating 'In this process, measures taken may involve derogation from obligations under the International Covenant on Civil and Political Rights regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible in Article 4 of the said Covenant'. UN, *Turkey: Notification under Article 4(3)*, Depositary Notification C.N.580.2016.TREATIES-IV.4 (New York, 21 July 2016) <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf> accessed 22 May 2017.

[37] Instead, stating that emergency measures 'may' result. See, eg, Martin Scheinin, 'Turkey's Derogation from Human Rights Treaties – an Update' (*EJIL: Talk!*, 18 August 2016) <http://www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/> accessed 21 May 2017.

[38] Council of Europe, Commission for Human Rights, *Urgent measures are needed to restore freedom of expression in Turkey* (Strasbourg, 15 February 2017) <http://www.coe.int/en/web/commissioner/-/urgent-measures-are-needed-to-restore-freedom-of-expression-in-turkey> accessed 22 Ma 2017. In response, see *Observations by the Turkish authorities on the Commissioner's Memorandum on freedom of expression and media freedom in Turkey*, CommDH/GovRep(2017)2 (Strasbourg, 15 Feb 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/GovRep(2017)2&Language=lanEnglish&direct=true> accessed 22 May 2017. See also Council of Europe Commissioner for Human Rights (Nils Muižnieks), *Memorandum on freedom of expression and media freedom in Turkey*, CommDH(2017)5/ (Strasbourg, 15 Feb. 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2017)5&Language=lanAll&direct=true> accessed 22 May 2017; Emre Turkut (n 34). See also *Annual Activity Report 2016* (n 26), in which the Council of Europe criticises the recent tendency of derogating Member States to effect a 'quasi-automatic prolongation of states of emergency and derogations from the Convention', ostensibly to fight terrorism.

[39] Council of Europe, 'News: Ukraine derogation from European Convention on Human Rights', (Strasbourg, 10 June 2016) <http://www.coe.int/en/web/secretary-general/news/-

Otherwise, the Council of Europe website notes that eight ECHR state parties have derogated in the past,[43] including the UK. The UK is also among four ECHR state parties which have been required by the ECtHR to justify their derogation measures.[44] As ECHR derogation is not entirely an unchallengeable, sovereign act, it might be thought the UK might exercise due caution to ensure it fulfilled the necessary conditions *prior to* declaring an emergency and seeking to derogate from the ECHR. Instead, it appears the UK has chosen to pre-empt concrete 'events', and announce its 'presumption to derogate' in future, *in advance*, which is highly unusual, if not deeply odd, as the government appears 'anticipatorily' to be doing what any ECHR (and ICCPR) state party has the flexibility to do, but only *in response* to a 'public emergency threatening the life of the nation', and regarding which derogation is factually both 'absolutely necessary' and 'proportionate'.[45]

3. The 'Presumption to Derogate'

It is worth reiterating that the issue of derogation arises in a context of recent, human rights protections for British military personnel deployed overseas. Prior to *Smith (No. 2)*,[46] UK common law imposed no special duty of care on the

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/asset_publisher/EYlBJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fsecretary-general%2Fnews%3Fp_p_id%3D101_INSTANCE_EYlBJNjXtA5U%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1> accessed 22 May 2017.

[40] Council of Europe, *Ukraine - Declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, Notification - JJ8034C Tr./005-186 (Strasbourg, 5 November 2015) <https://wcd.coe.int/ViewDoc.jsp?p=&id=2380047&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[41] Council of Europe, *Ukraine – Declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, Notification – JJ8172C Tr./005-190 (Strasbourg, 1 July 2016) <https://wcd.coe.int/ViewDoc.jsp?p=&id=2435663&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017.

[42] Council of Europe, *Ukraine – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification – JJ8318C Tr./005-205 (Strasbourg, 3 February 2017) <https://wcd.coe.int/ViewDoc.jsp?p=&id=2452899&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> accessed 22 May 2017 .

[43] Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom. 'Factsheet' (n 21) 2.

[44] ibid, for a brief overview of the cases in which the four states parties were asked to justify derogation measures.

[45] See, eg, Raphael Comte (n 21).

[46] (n 1).

government (in tort or otherwise) to protect its military personnel.[47] The MOD is subject to ordinary employment duties to provide a safe system of work, including supervision, training, equipment, competent colleagues, and so on, such duties have not been extended traditionally to personnel when engaged with the enemy, and the MOD is also exempt from criminal prosecution in such circumstances.[48] On the other hand, as the armed forces fall within the definition of a public authority, they are expected to comply with national and international law, including human rights law.[49] Obviously, there are 'different moral valences in human rights law and the laws of war – the key difference being the role of military necessity in the latter',[50] yet a long-standing, tacit recognition, that the nature of military service and the use of armed force entail restrictions on the civilian rights of service personnel endures, such that, until recently, any 'entitlement' to human rights or other special protections for service personnel, most notably their right to life, has had to await case law, judicial activism, and a high number of military-related damages actions against the UK Government,[51] whether brought by British military personnel, by those they have detained and/or imprisoned, and/or by their families.

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[47] A situation somewhat altered by s 7 HRA, and since influenced by *Osman v. UK* 23452/94 (2009) 29 EHRR 245.

[48] Nonetheless, the Health and Safety Executive can issue Crown enforcement notices and issue a Crown censure in lieu of criminal proceedings. Anthony Forster, 'British judicial engagement and the juridification of the armed forces' [2012] 88(2) International Affairs 283, 291 n. 41, citing, inter alia, *Mulcahy v Ministry of Defence* [1996] EWCA Civ 1323; *Multiple Claimants v. MOD* [2003] EWHC 1334; *MOD v. Radclyffe* [2009] EWCA Civ. 635.

[49] ibid 286, citing Richard Ball (citation omitted). See also Geir Ulfstein, *Interpretation of the ECHR in the Light of Other International Instruments*, PluriCourts Research Paper No. 15-05 (June 17, 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619592> accessed 22 May 2017.

[50] Miles Jackson, 'The Fog of Law' (*EJIL: Talk!*, 21 April 2015) <https://www.ejiltalk.org/the-fog-of-law/> accessed 21 May 2017. See also Tomuschat (n 4) (absence of remedies in IHL necessitates the intervention of the ECtHR).

[51] See, eg, Monica Feria-Tinta, 'Extra-Territorial Claims in the "Spider's Web" of the Law? UK Supreme Court Judgment in *Ministry of Defence v Iraqi Civilians*' (*EJIL: Talk!*, 25 May 2016) <www.ejiltalk.org/extra-territorial-claims-in-the-spider's-web-of-the-law?-uk-supreme-court-judgment-in-ministry-of-defence-v-iraqi-civilians/> accessed 21 May 2017 (14 lead claimants, in claims by over 600 Iraqi citizens, alleging unlawful detention and/or physical maltreatment at the hands of British armed forces in Iraq between 2003 and 2009). But see Peter Walker, 'Iraq war claims unit to be shut down, says UK defence minister', *The Guardian* (London, 10 February 2017) <https://www.theguardian.com/world/2017/feb/10/iraq-war-claims-unit-to-be-shut-down-says-uk-defence-secretary> accessed 21 May 2017; Owen Bowcott, 'Phil Shiner: steep fall from grace for leading human rights lawyer', *The Guardian* (London, 2 February 2017) <https://www.theguardian.com/law/2017/feb/02/phil-shiner-steep-fall-from-grace-leading-uk-human-rights-lawyer-iraq> accessed 21 May 2017; Robert Mendick, 'Top lawyer facing criminal enquiry over "bribes" paid to Iraqis over abuse claims against British troops', *The Telegraph* (London, 3 August 2016) <http://www.telegraph.co.uk/news/2016/08/03/top-lawyer-facing-criminal-inquiry-over-bribes-paid-to-iraqis-br/> accessed 21 May 2017 (claims Iraqi civilians were bribed to bring abuse claims against British soldiers; bribes allegedly disguised as publicly-funded legal aid expenses).

Such litigation in turn has required the ECtHR and the English courts to grapple with applying the ECHR extra-territorially in military environments. While this litigation has been highly contentious, of particular concern are the UK government's stated rationales for its future 'presumption to derogate', which rests in part on a basis other than a 'public emergency threatening the life of the nation'. Specifically, the government emphasises that a 'presumption of derogation' in future would be intended to 'protect British troops serving in future conflicts' from what the government terms an 'industry of vexatious' and 'persistent legal claims', costing millions of pounds, and thusly, to avoid 'undermin[ing] the operational effectiveness of the Armed Forces.[52] The financial nature of these rationales makes doubly-mystifying the qualifying phrase 'if possible in the circumstances that exist at that time', other than, perhaps, implying the possibility of an adverse ECtHR opinion or two, and one wonders what the government has in mind in terms of the 'impossible'. Be that as it may, by indicating officially that the government 'may' derogate during future *military* deployments abroad, the government begins to normalise the derogation process within a 'patriotic' (rather than strictly 'defensive') context, which risks entrenching 'temporary' emergency security laws, diluting the rule of law, and conditioning the public at large to expect less in general from governmental duties of care.

The gravity of these and related dangers led the UK Parliament's Joint Committee on Human Rights (JCHR) to respond rapidly by letter to the Defence Secretary's October 2016 announcement. In it, the JCHR posed a series of probing questions, and a separate request for specific data and detail as to the alleged 'vexatious' and 'persistent legal claims' on which a future 'presumption to derogate' might be based.[53] The government was requested to quantify its claims of 'vexatiousness', to provide actual numbers of claims which have been brought, settled, determined and/or dismissed by a court, and to account for the actual amounts paid in legal aid and compensation resulting from the wars in Afghanistan and Iraq. The JCHR targeted most of its 25 questions in the letter's Annex at the specific requirements of Article 15 ECHR, eg, the exigencies of 'war or other public emergency threatening the life of the nation', and the requirement that derogation must be 'strictly required' by these exigencies, and consistent with other international obligations. The JCHR reminded the Defence Secretary that, as per Article 15(2), some rights cannot be derogated, and the JCHR inquired specifically regarding the total number of claims brought under non-derogable Articles 2 and 3 ECHR, as well as under Article 5 (the right to liberty), which latter has an exhaustive list of possible

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[52] News story (n 6).
[53] JCHR, *Letter: The Government's Proposed Derogation from the ECHR*, 13 October 2016, <http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/Letter-to-Defence-Secretary-re-proposed-derogation-from-ECHR-131016.pdf> accessed 21 May 2017.

exceptions.[54] Additional questions concerned whether adequate judicial and Parliamentary scrutiny of a 'presumption to derogate' in future would be available, and the likely implications of derogation on the wider European system of rights enforcement.[55]

The Defence Secretary, in his initial response on 22 November, avoided answering many of the JCHR's questions, stating only that they could not yet be answered 'because the Government has only announced an intention to derogate, not an actual derogation'.[56] Consequently, the government was reluctant to engage in hypothetical debate in advance of a relevant situation arising. The response of 22 November also acknowledged that a future derogation would need justification 'in the precise circumstances of the particular military operation in question',[57] and, therefore, that the government was only indicating its desire in future to secure sufficient flexibility. In the JCHR's response to this letter, on 16 December, the JCHR Chair reminded the government that

> The last time the UK derogated from the ECHR, in the wake of 9/11, the derogation received little parliamentary scrutiny and was later found to be incompatible with the ECHR by both the UK's highest court and the European Court of Human Rights.[58] This time, the Government's case for intending to derogate rests on a number of assertions which need to be rigorously tested.[59]

The JCHR also opened-up the discussion to the public, inviting their written submissions by 31 March 2017, extended to 7 April, in order for Parliament to hear and understand the public's views and any concerns there may be regarding the government's announced intention. However, the Committee has now closed this inquiry due to the snap calling of a General Election on 8 June

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[54] See, eg, Council of Europe/European Court of Human Rights, *Guide on Article 5 of the Convention: Right to Liberty and Security* (Strasbourg, 2014) <http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> accessed 22 May 2017.

[55] A response by 4 November was requested. JCHR, *Letter* (n 53).

[56] Parliamentary Business, JCHR, *Enquiry Background: ECHR: Committee launches inquiry into Government's proposed derogation*, 16 December 2016 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/echr-derogation-launch-16-17/> accessed 21 May 2017.

[57] ibid.

[58] A reference to *A and Others v. the UK* Appln no 3455/05 (Grand Chamber, 19 February 2009) <http://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2638619-2883392%22]}> accessed 22 May 2017, in which the UK Supreme Court had previously deemed detention without trial only of foreign terrorist suspects to be discriminatory. cf Owen Boycott, 'Thatcher gave way on dropping powers to detain terrorists, files show', *The Guardian* (London, 30 December 2016) <https://www.theguardian.com/politics/2016/dec/30/margaret-thatcher-gave-way-on-dropping-terrorist-detention-powers-northern-ireland> accessed 21 May 2017.

[59] JCHR *Enquiry Background* (n 56).

2017, which necessitated the dissolution of Parliament on 3 May 2017, at which point all current Select Committees ceased to exist[60] Otherwise, the most recent response to the JCHR from the Defence Secretary was dated 28 February 2017, and published by the JCHR on 1 March 2017, and as the current JCHR has indicated, at the time of writing, that 'if an inquiry on this subject is held in the future, the Committee may refer to the evidence already gathered as part of this inquiry',[61] the details of the Defence Secretary's most recent correspondence are now briefly summarised.

4. The Government Memorandum

The Defence Secretary's response to the JCHR of 28 February confirms 'that no decision has been taken as to whether in the context of any particular future military operation it would or would not be appropriate to derogate', and that 'everything possible will be done to facilitate early Parliamentary scrutiny if and when we decide to derogate'.[62] It notes with approval that the UK Supreme Court acknowledges the 'analytic and practical difficulties' of extending the jurisdiction of the ECHR 'into realms for which it was not designed', and he reiterates that it is not yet 'possible to provide sufficient detail to allow meaningful scrutiny now of the likely justification of future decisions'.[63] Nonetheless, accompanying this brief response is a short 'Government Memorandum', in which the government seeks to justify more completely a future derogation. Via sections entitled 'Policy Rationale', 'Legislation', 'Conditions for Derogation', 'Operational Effectiveness and NATO', 'Legal Claims', and 'Compensation', the Memorandum concludes that, although the UK Supreme Court has modified its approach, and begun to modify human rights in operational environments, to which IHL must apply,[64] it was less clear

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[60] At the time of writing, the Enquiry is now terminated, due to the snap General Election scheduled for 8 June 2017. Parliamentary Business, JCHR, *Enquiry status: concluded*, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/publications/> accessed 21 May 2017. See also Ed Bates, 'Extra-territorial derogations from the ECHR for future armed conflicts involving the UK?', ukstrasbourgspotlight, 31 March 2017 <https://ukstrasbourgspotlight.wordpress.com/2017/03/31/extra-territorial-derogations-from-the-echr-for-future-armed-conflicts-involving-the-uk/> accessed 22 May 2017 (written submission to the JCHR, but not yet published as of 15 April).

[61] *Enquiry status* (n 60); Secretary of State for Defence, *Letter to the Chair of the JCHR*, 28 February 2017 <http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301_SoS_to_Chair_re_Derogation.pdf> accessed 22 May 2017.

[62] *Letter* (n 61), annexed Government Memorandum [2] and [4], respectively.

[63] ibid [3] and [4], respectively.

[64] The Defence Secretary considers such cases as the following to be 'helpful': *Mohammed & Ors v MOD* [2017] UKSC 1 & [2017] UKSC 2; and, joined appeals in *Serdar Mohammed & Al-Waheed v. MOD* [2017] UKSC 2; both concerned UN-mandated peacekeeping operations in Iraq and Afghanistan. In *Mohammed & Ors*, the Court agreed the government was not liable in tort for wrongful detention or treatment; the acts in question had been Crown acts of state, taken

whether the ECtHR would always be similarly inclined. Hence, a 'presumption to derogate' in future operations would be warranted, to fill a perceived need for 'a clear legal framework' in such situations,[65] i.e., IHL alone would be applicable in such situations.

The Memorandum admits that the UK would be the first ECHR state party to derogate in respect of its overseas activities.[66] Whilst maintaining that the case for derogating is 'obvious', the Memorandum also constitutes the first time the government has publicly provided somewhat more detailed reasons for its allegations that extending ECHR extra-territoriality to military deployments overseas had adverse impacts. Moreover, while 'the UK's position has always been that IHL regulates armed conflict',[67] in order to use lethal force, and detain lawfully, the ECtHR's own guidance in relation to the meaning of 'war' is cited with approval: 'any substantial violence or unrest short of war likely to fall within the scope of the second limb of article 15(1), "a public emergency threatening the life of the nation"'.[68] The section entitled 'Operational Effectiveness and NATO' concentrates on the former, as not all NATO countries are party to the ECHR.[69]

The Memorandum highlights that practical difficulties are encountered with human rights in operational environments, including potential negative effects on the morale, fighting power and operational effectiveness of military personnel, and the risk of military witnesses relapsing with PTSD and other psychological difficulties during ECHR Article 2-compliant investigations.[70]

However, the sections entitled 'Legal Claims' and 'Compensation' form by far the bulk of the Memorandum. Pointing to the Conservative Party 2015 election

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during foreign military operations. In *Waheed*, the Court approved the detention of prisoners for periods exceeding 96 hours when necessary for imperative security reasons, as implicitly authorised by UN Security Council resolutions; ECHR Article 5 could 'accommodate' this, but procedures must comply with Article 5(4). See, eg, Shaheed Fatima, QC, 'UK Supreme Court Judgment on Extra-Territorial Detention in Iraq and Afghanistan' (*Just Security*, 17 January 2017) <https://www.justsecurity.org/36407/uk-supreme-court-judgment-extra-territorial-detention-iraq-afghanistan/> accessed 22 May 2017.

[65] Government Memorandum (n 62) [17].

[66] ibid [3].

[67] ibid [4]. Contrast *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Rep 1996, 22 (human rights protections do not cease during armed conflict); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Rep, 136 (the facts determine whether some rights arise under IHL, human rights, or both legal regimes). Consider also *Bankovic* (n 7) ('piecemeal' applicability of the ECHR, if relevant). Government Memorandum (n 62) [6], entitled 'Legislation', notes mainly that any derogation order would be subject to Parliamentary debate and approval.

[68] Government Memorandum (n 62) [8]. [6] cites the 'ECtHR Guide on Article 15 of the ECHR'.

[69] ibid [10].

[70] ibid [9]. See, eg, *R (on the application of Smith) (Respondent) v SOS for Defence (Appellant) and another* [2010] UKSC 29 (inquests must satisfy ECHR Article 2 procedures).

manifesto and a Written Ministerial Statement of 10 October 2016, the government's commitment to prevent 'persistent' human rights during overseas military operations is maintained,[71] but the Memorandum defends the government's position. It asserts that, of some '1400 judicial review applications against the Ministry of Defence relating to the Iraq conflict', 'only a tiny minority' of the compensation claims 'have been accompanied by full documentation'.[72] The absence of evidence that has plagued many of the claims brought under common law is highlighted, and it is asserted 'that a number of claimants had changed their stories halfway through their cases'.[73]

As for government pay-outs to litigants, it is tersely noted that 'the Ministry of Defence has settled over 300 wrongful detention claims on a tariff basis, according to length of detention' – a policy decision made after the ECtHR judgment in *Al Jedda v United Kingdom*,[74] in which the Court found no lawful authority to detain Iraqi civilians during non-international phases of UK operations in Iraq: lawful detention required prior UN Security Council authorisation, which had not occurred. Subsequently, however, the Court, in *Hassan v United Kingdom,*[75] had in fact qualified this stance: the safeguards of IHL and the ECHR during armed conflicts co-exist, but issues surrounding prisoners of war and detainees must be determined by IHL in line with the security risks. This judicial change-of-heart leads the Memorandum to state that '[i]t is therefore inaccurate to characterise the settlement of those claims as an acceptance of wrongdoing on the part of the UK'.[76]

The Memorandum concludes that a clear legal framework is needed for operational and strategic decision-making, thus implying that the 'presumption to derogate' is aimed squarely at a future intention to make IHL, alone, the legal framework applied to overseas military deployments.[77] Overall, this response to the JCHR may placate those critical of the high financial costs and compensatory damages incurred during recent overseas deployments.[78] In

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[71] Government Memorandum (n 62) [14].
[72] ibid [11]. [12] refers to the 'now-defunct Public Interest Lawyers'.
[73] ibid [16] n 6, citing *R (Al-Saadoon & ors.* n 9*)*, regarding altered testimonies.
[74] ibid (62) [15 n 8] citing (2011) 53 EHRR 23. See also (n 11). cf Nick Cohen, 'Nobody, not even British soldiers, should be above the law', *The Guardian* (London, 23 January 2016) <https://www.theguardian.com/commentisfree/2016/jan/23/british-soldiers-should-not-be-above-law> accessed 22 May 2017 (mistreatment of 1,514 Iraqis alleged, including 280 who died; MOD has paid out £20m in 326 cases without admitting liability).
[75] Government Memorandum (n 62) [16 n 9] citing (2014) 38 BHRC 358.
[76] ibid [16].
[77] ibid [17].
[78] See, eg, See Tom Tugendhat and Laura Croft, *Policy Exchange: The Fog of Law: An introduction to the legal erosion of British fighting power,* Appendix C (Policy Exchange, 18 October 2013) < https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf> accessed 22 May 2017, and, its follow-up, Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat*

contrast, the case of *Smith v. MOD (No. 2)* [2013],[79] concerning the Article 2 'right to life' of serving military personnel seems particularly apposite to illustrate the ground-breaking nature of ECtHR extra-territoriality, as the Supreme Court acknowledged and reinforced for domestic law purposes.[80] Most crucially, the Supreme Court recognised that, when the time arrives to assess whether the government owes duties of care to all those under its power and control, the same considerations apply to claims brought under ECHR Article 2 as to common law tort claims, including for its serving military personnel.[81]

5. *Smith v. UK (No. 2) [2013]*

The issue of a future ECHR derogation, designed to pre-empt human rights in favour of IHL during active military deployments overseas, runs counter both to 'teleological' Strasbourg case law on extra-territoriality,[82] and to notions of human rights 'universality'. In turn, the influence of the Strasbourg law prompted the UK Supreme Court majority decision in *Smith v. UK (No. 2)*,[83] and foreshadows the recent and highly-critical Iraq Inquiry Report, which notes

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(Policy Exchange, 2015), < https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf> accessed 22 May 2017. Additional publications and links from the Policy Exchange on the topic may be found at <http://www.policyexchange.org.uk/component/search/?searchword=fog%20of%20law&searchphrase=exact&limit=20> accessed 22 May 2017. See also the Corporate Manslaughter and Corporate Homicide Act 2007, which, while not applicable to the battlefield, has 'caused anxiety in the MOD', by allowing juries 'to consider the attitudes, policies, systems and accepted practices within the organisation. Forster (n 48) 291 (citations omitted).

[79] In *Smith (No. 2)* (n 1), the UK Supreme Court took extensive account of the long line of Strasbourg case law which has culminated in the extra-territorial reach of the ECHR.

[80] The course of which caused much legal commentary. See, eg, Case Comment, Slapper, 'The right to life on the battlefield' [2010] 74(5) JCrimL 383; Case Comment, 'Right to life - jurisdiction - British troops dying or being injured whilst on active military service in Iraq' [2011] 109(Jul) Human Rights Updater 6; P. Ronchi, 'The borders of human rights' [2012] 128(Jan.) LQR 20; Case Comment, 'Claims involving Armed Forces: duty of care owed by Ministry of Defence' [Dec/Jan 2012-13] PI Comp 10; Case Comment, Jonathan Morgan, 'Negligence: into battle' [2013] 72(1) Cambr LJ 14; Case Comment, 'Tort: Smith v Ministry of Defence [2012] EWCA Civ 1365, [2013] 2 WLR 27 (CA (Civ Div))' [2013] Public Law 171; Case Comment, Mullender, 'Military operations, fairness and the British state' [2014] 130(Jan) LQR 28.

[81] Until *Smith (No. 2)* (n 1), nothing in domestic jurisprudence 'suggest[ed] that in parallel with the statutory cause of action', common law claims for breaches of human rights have also developed. Brice Dickson, 'If the Human Rights Act were repealed, could the common law fill the void?, Oxford Human Rights Hub, 27 November 2013 <http://ohrh.law.ox.ac.uk/if-the-human-rights-act-were-repealed-could-the-common-law-fill-the-void/> accessed 22 |May 2017.

[82] Including, inter alia, *Bankovic* (n 7).

[83] Due, as per *R (on the application of Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20], Bingham L, to the duty of the national court 'to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less'. See Paula Giliker, 'The Influence of EU and European Human Rights Law on English Private Law' [2015] 64(2) ICLQ 237 s IV(C).

both that the consequences of the 2003 invasion and subsequent military occupation of Iraq are still being felt,[84] and that many serving British personnel still experience service-related problems.[85] Regardless, the evolution of extra-territoriality has been hotly contested throughout,[86] and consequently prompted a number of 'accommodations' to be made by the ECtHR in order to adjust the IHL-ECHR balance,[87] such that one could suppose that extra-territoriality might be viewed more favourably.

Be that as it may, in *Smith (No. 2)*, breach of the government's duties of care under tort negligence and Article 2 ECHR were alleged, due to inadequate military training and/or equipment. The claims arose out of the deaths of three soldiers and the injuries of another two, while serving in the British Army in Iraq between 2003 and 2006.[88] The Court was asked to deal mainly with three issues: whether two of the deaths (inadequate equipment) were within ECHR Article 1 jurisdiction, whether the UK owed Article 2 'positive' duties to all the deceased soldiers, and whether the doctrine of combat immunity constituted a defence to the negligence claims (inadequate equipment, technology and training). A majority in the Supreme Court allowed the separate claims in tort and Article 2 ECHR,[89] and narrowly construed the defence of combat immunity to cover only active military operations or action immediately preceding combat,[90] and thus denying the MOD's contention that the doctrine should be extended to cover both training and equipment procurement. The Court considered this would be excessive, as pre-theatre training and equipment procurement decisions can occur far in advance of operations.[91]

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[84] See, eg, The Iraq Inquiry: Report [2016], Vol 6 ss 6.3 and 11, and s 14, <http://www.iraqinquiry.org.uk/the-report/> accessed 22 May 2017.
[85] ibid passim. See also Holly Watt, 'More than 2500 soldiers jailed last year' *The Guardian* (London, 18 March 2017) <https://www.theguardian.com/uk-news/2017/mar/18/uk-armed-forces-veterans-prison-population-mental-health-issues> accessed 22 May 2017 ('concerns about post-conflict mental health issues').
[86] See, eg, *The Fog of Law* (n 78).
[87] Consider Case Note, Cedric De Koker, '*Hassan v United Kingdom*: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts' [2015] 31(81) Utrecht JInt & EurL 90; Marko Milanovic, '*Hassan v. United Kingdom*, IHL and IHRL, and Other News in (Extra-)Territoriality and Shared Responsibility' (*EJIL: Talk!*, 18 December 2013) <http://www.ejiltalk.org/hassan-v-united-kingdom-ihl-and-ihrl-and-other-news-in-extra-territoriality-and-shared-responsibility/> accessed 21 May 2017.
[88] For a brief but reasonably comprehensive overview of the case, see Alexia Solomou, 'Case Comment: *Smith & Ors v. MOD* [2013] UKSC41, UKSC blog, June 2013 <http://ukscblog.com/case-comment-smith-ors-v-ministry-of-defence-2013-uksc-41/> accessed 22 May 2017.
[89] *Smith* (*No. 2)* (n 1) [101].
[90] ibid [83] – [100].
[91] The EU Commission scrutinises Member States' procurement decisions. Directive 2009/81/EC of 13 July 2009 is designed specifically to bring procurement 'inside' the Internal Market. See the Commission Communication on the European Defence and Security Sector

A 4 - 3 majority emphasised that the same considerations applied for both the tort negligence and ECHR claims, and established for the first time in British law that military personnel deployed on active overseas operations could sue the government under both standards of duties of care. This it did cautiously, however, exempting 'high level' decisions and the actual conduct of operations from review,[92] and cautioning that all such matters would need further investigation as to their surrounding facts and evidence.[93] Even so, a 'middle ground' remained, albeit one carrying a wide margin of appreciation, 'where it would be reasonable to expect the individual to be afforded the protection of the article'.[94] Seemingly anticipating the reasons for the current government's proposal of a future 'presumption to derogate', the Court warned that this 'middle ground' should not be utilised to impede the work of the military, or to provoke, through the threat of litigation,[95] a 'defensive approach' to strategic and procurement issues or to tactical and combat stages when equipment is being deployed. It also cautioned against imposing 'unrealistic or excessively burdensome' standards on military commanders.[96]

In contrast, the minority did not wish to extend the duties either of Article 2 ECHR or of common law negligence into what they argued was a new field.[97] Moreover, human rights and tort negligence should remain quite separate in British law, rather than converge. Indeed, a preference was noted for deciding the case entirely in tort negligence, with its familiar parameters of practical 'reasonableness'. Therefore, the minority would have rejected the Article 2 claims because of the political nature of military matters, including training and equipment procurement decisions, which require the (*political*) allocation of available resources. Arguing that Article 2 ECHR should be engaged, if at all, only for systematic, not operational failures,[98] it was made clear that Article 2 ECHR should not be extended to errors in the chain of command or relate to the conduct of operations. It was also 'unclear how far the two substantive [framework and operational] duties are separated, with middle ground between them, or, form part of a continuum covering almost every aspect of state activity'.[99]

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adopted on 24 July 2013, COM(2013)0542, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0542> accessed 22 May 2017. See also Martin Trybus, 'The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution' [2013] EL Rev 3.

[92] *Smith* (No. 2) (n 1) [176] (Lord Hope).

[93] ibid [64] – [66] and [76] – [81].

[94] ibid [76].

[95] ibid [100] (Lord Hope). See [120], [131] and [147] (|Lords Mance and Wilson) and [153] (Lord Carnwath).

[96] Ibid [99].

[97] ibid [157] (Lord Carnwath dissenting). See generally [153] – [188].

[98] Ibid [106] (Lords Mance and Wilson dissenting). See generally [102] – [152].

[99] Ibid [104] (Lord Mance dissenting).

In summary, *Smith (No. 2)* well-illustrates how polarised the arguments become when there is a choice between legal frameworks when states employ military force. The gradual erosion of Crown and combat immunities, of political control over when and where to deploy the military, of military control over training, and of political and military control over equipment procurement and operational planning, all collided in the case. The breakthrough of more extensive duties of care to military personnel deployed overseas on active service, and the recognition that a 'middle ground' exists in which they may bring litigation,[100] encourages not only greater public and judicial scrutiny of military deployments in general, but also necessitates more official caution in particular, as already promoted by numerous EU directives and other measures[101] intended to increase transparency and avoid both protectionism and possible corruption.[102]

The former 'fixed points' of reference of military life, as noted by Forster,[103] which once ensured 'the hierarchical and impenetrable nature of the armed forces',[104] have long been due for modernisation, while the 'golden shield' of military immunity has vanished.[105] In their place is the rule of law, already 'accommodating' the ECHR to the battlefield necessities reflected in IHL. On this basis, normalising military derogations in future would not assist in desired 'clarity'.[106] On the contrary, the government's response, via its proposed 'presumption to derogate' in future, appears designed mainly to prevent greater public, departmental and/or judicial scrutiny over the government's deployments of armed force,[107] and with it, to block individual

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[100] ibid [64] – [66] and [76] – [81].

[101] See, eg, Johan Joos and Sam Voet, European Defence and Security Procurement: difficulties and action points' (*Eversheds Brussels*, February 2015) <http://www.eversheds-sutherland.com/documents/global/belgium/Eversheds-Brussels-Procurement-e-Briefing-February-2015.pdf> accessed 22 May 2017.

[102] cf TFEU Article 346(1)(b), which permits exemption for 'essential interests of its security which are connected with the production or trade in arms, munitions and war material'. See UK Government Explanatory Memorandum, *The Defence and Security Public Contracts Regulations 2011* [5] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35925/dsd_govt_awareness_guide.pdf> accessed 22 May 2017.

[103] (1) Governmental responsibility for the legality of British uses of force, (2) Crown and combat immunity from liability, (3) restrictions on civilian rights of military personnel, (4) a separate military judicial system, permitting 'the right to be different', and (5) the inability of the family and friends of military personnel to challenge MOD decisions, 'especially the appropriate levels of prior training, equipment and command responsibility'. Forster (n 48) 284 - 285.

[104] ibid 299.

[105] ibid 286, quoting James Burke (citation omitted).

[106] ibid 297 - 299 (asserting, at 299, that 'rights-based systems bring with them permanent instability').

[107] As regulated by the Inquiries Act 2005, the typology of which is described in Andrew Forster, 'The military, war and the state: testing authority jurisdiction, allegiance and

rights litigation, coroners courts,[108] resort to employment tribunals by military personnel, and so on, even though (or because) such forms of redress are vital in deterring impunity, malpractice and gross negligence.[109]

The many controversies surrounding recent deployments of British service personnel abroad, particularly in non-self-defence contexts or 'wars of choice',[110] along with the availability of litigation, demands for public enquiries and so on, which publicise the symptoms *and* causes of public disquiet, and which place greater pressure on politicians to pause longer when deciding to utilise the military instrument, have all proven crucial to the health and maintenance of vibrant British democratic institutions.[111] Therefore, and in view of the fact that there is as yet no guarantee that the UK will remain a Member State of the ECHR in future,[112] the alternative realities, had cases such as *Smith (No. 2)*, and public inquiries such as Chilcot[113] or Al-Sweady,[114] and, indeed, the Deepcut Review,[115] not occurred, do not bear close scrutiny.

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obedience' [March 2011] 27(1) Defense and Security Analysis 55, 58. See, eg, the Hutton Enquiry in 2004 (regarding the death of MOD scientist David Kelly), the Deepcut Review in 2006 (deaths of four recruits at the Deepcut army barracks), the Nimrod Review in 2009 (loss of aircraft in Afghanistan), the Saville Enquiry in 2010 (Bloody Sunday), the non-statutory, independent Mull of Kintyre inquiry in 2011 (RAF Chinook helicopter crash of 1994), the Gage Inquiry in 2011 (death of Baha Musa in Iraq in 2003), and more recently, the Chilcot Report in July 2016 (Iraq war).

[108] See, eg, Natasha Holcroft-Emmess, 'Military's Deepcut Failings Exposed in Inquest Made Possible by the Human Rights Act' (*RightsInfo*, 3 June 2016) <https://rightsinfo.org/militarys-deepcut-failings-exposed-inquest-made-possibly-human-rights-act/> accessed 21 May 2017 (Article 2 ECHR engaged in the alleged suicide of Private Cheryl James at the Deepcut army barracks). Enhanced investigations were introduced in *R v HM Coroner for Western Somersetshire, ex parte Jean Middleton & Secretary of State for Home Department (Interested Party)* [2004] UKHL 10.

[109] Forster (n 48) 286 – 295. See also Clearing the Fog of Law Executive Summary (n 78) 7 (regarding the increase in litigation brought against the MOD).

[110] See, eg, E. Chadwick, 'No comity in error: asylum and "wars of choice"' [2005] 44(12) Revue de Droit Militaire et de Droit de la Guerre 51.

[111] Reminding the government it may not 'simply assert interests of state or the public interest and rely upon that as a justification for the commission of wrongs', as per *Bici v MoD* [2004] EWHC 786 (QB) (Elias J citing *Entick v Carrington* (1765) 19 Howell's State Trials 1029).

[112] See, eg, D. Harris, M. O'Boyle, E. Bates and C. Buckley, 'Putting the Potential UK Withdrawal from the ECHR into Perspective', ECHR Blog, 14 August 2014 <http://echrblog.blogspot.co.uk/2014/08/putting-potential-uk-withdrawal-from.html> accessed 22 May 2017.

[113] See, eg, N. Hopkins, 'MoD left UK forces in Iraq ill-equipped amid lack of plan, Chilcot Report says', The *Guardian* (London, 6 July 2016) <https://www.theguardian.com/uk-news/2016/jul/06/mod-left-uk-forces-in-iraq-ill-equipped-amid-lack-of-plan-chilcot-report-says> accessed 21 May 2017; J. Rozenberg, 'The Iraq war enquiry has left the door open for Tony Blair to be prosecuted', *The Guardian* (London, 6 July 2016) <<https://www.theguardian.com/commentisfree/2016/jul/06/iraq-war-inquiry-chilcot-tony-blair-prosecute> accessed 21 May 2017 (real and material criticisms of preparation, planning, process); Natasha Holcroft-Emmess and Adam Wagner, 'Could Tony Blair Be Charged With War Crimes And Other Important Chilcot Inquiry Questions' (*RightsInfo*, 6 July 2016)

6. Conclusion

This brief discussion considered the current, Conservative Party-led government's stated intention in October 2016 to derogate from the ECHR during future military deployments overseas. The government has sought to justify this on the need for greater legal 'clarity' during such deployments. However, this stated purpose is partly rationalised by a desire to reduce the costs of rights litigation which arise during military operations overseas, so must be queried on many levels. Further, safeguarding the human rights of all by erasing the rights of some is fundamentally counter-intuitive: human rights form a protective shield for everyone, rather than just for some, against government abuse. When the government states it is seeking to avoid the 'vexatious' litigation of recent military deployments, it disregards the fact that some litigation has also been brought for the arbitrary and/or negligently-inflicted death or injury of British military personnel themselves, as well as for the alleged, unlawful detention and/or imprisonment of others. If the government resents having settled 'hundreds' of claims for wrongful detention, etc., it surely is worth remembering the conditions which led to that litigation in the first place. Finally, it is difficult to understand why the armed forces - a

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<http://rightsinfo.org/chilcot-inquiry-iraq-war-releases-report/?utm_source=Weekly+Updates&utm_campaign=7174b4c3d1-Weekly_Newsletter_Test4_22_2015&utm_medium=email&utm_term=0_5de50f2649-7174b4c3d1-115312793> accessed 21 May 2017.

[114] *Al-Sweady inquiry report*, Gov.UK (London, Ministry of Defence, 17 December 2014) <https://www.gov.uk/government/publications/al-sweady-inquiry-report> accessed 22 May 2017 (compiled by former high court judge, Sir Thayne Forbes, 17 December 2014). See, eg, Tim Wood, '"A Few Rotten Apples": A Review of Alleged Detainee Abuse by British Personnel in Iraq Following the Al Sweady Inquiry. Is There Still a Case to Answer?' [2016] 21(2) JCon & SecL 277; Richard Norton-Taylor and Owen Bowcott, 'Baha Mousa report criticises "cowardly and violent" British soldiers', *The Guardian* (London, 8 September 2011) <https://www.theguardian.com/world/2011/sep/08/baha-mousa-report-british-soldiers> accessed 21 May 2017; Richard Norton-Taylor, 'British troops accused of executing civilians', *The Guardian* (London, 23 February 2008) <https://www.theguardian.com/uk/2008/feb/23/military.iraq> accessed 21 May 2017; Richard Norton-Taylor, 'What is the al-Sweady enquiry?', *The Guardian* (London, 17 December 2014) <https://www.theguardian.com/uk-news/2014/dec/17/what-is-al-sweady-iraq-inquiry-key-points> accessed 21 May 2017.

[115] *The Deepcut Review*, Gov.UK (29 March 2006) <https://www.gov.uk/government/publications/the-deepcut-review> accessed 22 May 2017 (chaired by Nicholas Blake, QC). See, eg, Natasha Holcroft-Emmess, 'Military's Deepcut Failings Exposed in Inquest Made Possible by the Human Rights Act' (*RightsInfo*, 3 June 2016) <http://rightsinfo.org/militarys-deepcut-failings-exposed-inquest-made-possibly-human-rights-act/> accessed 21 May 2017 (Article 2 ECHR engaged in the alleged suicides at the Deepcut army barracks between 1995 and 2002). See also BBC News, 'Cheryl James: Deepcut soldier's death was suicide, coroner rules' (Surrey, 3 June 2016) <http://www.bbc.co.uk/news/uk-england-surrey-36438786> accessed 22 May 2017; Katie Jukes, 'Second Fresh Investigation Into Deepcut Barracks Death Triggered by Human Rights Act' (*RightsInfo*, 17 October 2016) <http://rightsinfo.org/human-rights-require-proper-inquests/> accessed 21 May 2017.

public authority – should not be expected to comply with national and international law, including human rights law, to the extent to which they are able.

The case of *Smith (No. 2)* well-illustrates these points, and underscores how and why the slow erosions of Crown and combat immunities, and of political and military control over when, where and how to use the military instrument, have long been overdue. The 'middle ground' left, albeit cautiously, by the UK Supreme Court for potential litigation in future is thus a salutary reminder of the virtuous – and necessary - clash of interests at stake. Public and judicial scrutiny of military decision-making, the ability to seek and obtain legal redress, and so on, must be maintained in a society where due care and regard are paid by those in power to the populations they purport to represent, regulate and protect. If not, a 'presumption to derogate' in future can only be viewed as a measure to normalise fewer rights, and to condition the public to expect less, never more, from those to whom their security and well-being are entrusted.